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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC-03-012-51132 Office: CALIFORNIA SERVICE CENTER Date: AUG 03 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker, Mexican French style. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed to establish that the beneficiary had the work experience required on the Form ETA 750. On appeal counsel states that the employment confirmation letter submitted for the record prior to the director's decision had been mistranslated.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Eligibility in this matter hinges on the beneficiary's work experience as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is November 15, 1999.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). The Form ETA 750, block 14, states that the position of a baker, Mexican and French style, requires two years of experience in the position offered.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification . . . . The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

Counsel initially submitted insufficient evidence of the beneficiary's work experience and insufficient evidence of the petitioner's ability to pay the proffered wage. Concerning the beneficiary's work experience counsel submitted only a letter in Spanish from a former employer with a certified English translation, plus the beneficiary's own statements on the Form ETA 750B. Concerning the petitioner's ability to pay the proffered wage counsel submitted a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001.

In a request for evidence (RFE) dated February 13, 2003, the director requested additional evidence to establish the beneficiary's work experience and to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present.

In response to the RFE, counsel submitted copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for the years 1999, 2000 and 2001. Counsel provided no further evidence relevant to the beneficiary's work experience.

The director determined that the evidence did not establish that the beneficiary had the required two years of experience in the offered position, and denied the petition.

On appeal, counsel submits a brief and additional evidence, consisting of a second letter in Spanish from the beneficiary's previous employer, dated August 4, 2003, with a certified English translation.

Counsel states on appeal that the earlier letter from the previous employer had been mistranslated by counsel's office, and that the translation contained an error in the person's name who signed the letter. Counsel states that the letter newly submitted on appeal states the beneficiary's title, his dates of employment, and number of hours worked per week, and contains an explanation for the absence of any employment records for the beneficiary.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The record before the director contained the first letter from the beneficiary's previous employer. The letter is in Spanish and is accompanied by an English translation. The Spanish copy bears an apparent stamp showing the name of the employer as "Panaderia y Pasteleria Fauri," in [redacted], information which is presented as part of the letterhead in the English translation.

The English translation states that the beneficiary worked for the employer from September 11, 1993 to October 19, 1996. That information is consistent with the information on the Form ETA 750B signed by the beneficiary on October 21, 1999, which states the beneficiary's prior work experience. On the ETA 750B the beneficiary states his job title with [redacted] and states the number of hours he worked per week as 40.

The English translation of the letter is inconsistent with the Spanish copy in some respects. The name appearing at the bottom of the Spanish copy is [redacted] and no title appears below that person's name. On the English translation the name appearing at the bottom of the letter is "[redacted]z," and the title "General Manager" appears below the name. The Spanish copy bears the date of September 23, 1999, in Spanish. No date of the letter appears on the English translation.

In the RFE dated February 13, 2003 the director requested additional evidence. Concerning the beneficiary's work experience, the RFE stated the following:

> **Experience**: Submit evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750.
>
> Evidence should be submitted in letter form on the previous employer's letterhead showing the name and title of the person verifying this information. State the beneficiary's title, duties, and dates or employment/experience and number of hours worked per week.
>
> If the experience is from outside the United States provide verifiable evidence that would establish that the applicant has met the labor certification requirements. Examples include work I.D., pay stubs, or tax returns.

Although the RFE gave details on style and content of the evidence required to establish the beneficiary's prior work experience, nothing in the RFE explicitly stated any deficiencies in the content of the employer's letter already submitted or in the translation of that letter into English. As noted above, the RFE also requested additional evidence relevant to the petitioner's ability to pay the proffered wage.

Counsel's response to the RFE included additional evidence relevant to the petitioner's ability to pay the proffered wage, but included no additional evidence relevant to the beneficiary's work experience.

The regulation at 8 C.F.R. § 103.2(b)(3) states "Any document containing foreign language submitted to [CIS] shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English."

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The evidence submitted prior to the decision of the director contained no explanation of the inconsistencies noted above between the Spanish copy and the English translation. Because of those inconsistencies the translation of the letter cannot be considered as reliable evidence.

For the foregoing reasons, the evidence in the record prior to the director's decision was insufficient to establish that the beneficiary had the required two years of experience in the offered position as of the priority date.

In his decision, the director stated that in response to the RFE the petitioner had submitted another copy of the previously submitted employer's letter. Notwithstanding that statement by the director, no such second copy is in the file. Moreover, counsel's letter in response to the RFE makes no mention of any attached copy of an employer's letter, but rather refers only to the copies of the petitioner's Form 1120S U.S. tax returns of an S corporation for the years 1999, 2000 and 2001. Those copies are found in the file. Therefore it appears that the director erred in stating that the petitioner submitted a second copy of the employer's letter which had been submitted initially.

The director also states in his decision that the employer's letter submitted initially had been "found to be insufficient." Director's decision, page 3. Although such a finding may be inferred from the fact that the RFE requested additional evidence relevant to the beneficiary's experience, the RFE contains no explicit finding concerning the employer's letter submitted initially. Therefore, prior to the director's decision, the petitioner had no notice that the director had discovered inconsistencies in the English translation of the employer's letter.

The regulation at 8 C.F.R. § 103.2(b)(8) states

> in . . . instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility [CIS] shall request the missing initial evidence, and may request additional evidence, including blood tests.

Although the RFE gave a detailed description of the type of information needed in any letter from a previous employer, the RFE failed to note that the English translation of the letter already in the record contained inconsistencies. The RFE did not request an accurate English translation of that letter. Although this was a procedural error by the director, the burden of proof remained on the petitioner. For the reasons discussed above, the director was correct in finding that the evidence in the record before him failed to establish that the beneficiary had the required two years of experience in the offered position as of the priority date. The director was therefore correct in his decision to deny the petition, based on the evidence then in the record.

On appeal counsel submits a second letter in Spanish from the beneficiary's previous employer, dated August 4, 2003, with a certified English translation.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

Since the RFE failed to note the deficiencies in the English translation of the employer's letter submitted initially, the petitioner was not given a reasonable opportunity to correct that evidentiary deficiency prior to the director's decision. For this reason, the employer's letter submitted for the first time on appeal is not precluded from consideration by *Matter of Soriano*.

The new employer's letter states that the beneficiary worked for the employer from September 11, 1993 through October 19, 1996 as a baker, using traditional Mexican and French recipes, 40 hours per week, Monday through Friday. The letter explains the absence of employment records for the beneficiary by stating that in the employer's country, which is Mexico, no obligation exists to save records of an employee who is no longer working with the company. The English translation accompanying the new employer's letter contains no apparent inconsistencies.

The duties of the beneficiary for his previous employer as described in the new employer's letter are substantially the same as the duties described in the Form ETA 750 for the offered position. The letter describes a period of three years of full-time employment. Therefore the letter shows more than two years of experience in the position offered.

According to the letter, the beneficiary left his employment in October 1996, approximately seven years prior to the August 2003 date of the newly-submitted letter. The letter provides an adequate explanation for the absence of employment records for the beneficiary, by stating that in Mexico no requirement exists to maintain employee records after an employee's employment has ended. The letter is signed by "Hilsias Farias Rodriguez," with the title "Owner" appearing under his name. As the owner of the business, that individual is authorized to confirm the beneficiary's former employment with that business.

The foregoing information in the newly-submitted employer's letter satisfies the requirements of the regulation at 8 C.F.R. § 204.5(g)(1). The petitioner has therefore established that the beneficiary had two years of experience as a baker, Mexican and French style, on November 15, 1999, as required by the ETA 750. Therefore, the petitioner has overcome this portion of the director's decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained. The petition is approved.